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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 BNSF RAILWAY COMPANY,

10 Plaintiff,

11 UNION PACIFIC RAILROAD
12 COMPANY, and PORT OF BENTON,

13 Plaintiff-Intervenors,

14 v.

15 TRI-CITY & OLYMPIA RAILROAD
16 COMPANY LLC,

17 Defendant.

18 NO. CV-09-5062-EFS

19 **ORDER ENTERING COURT'S RULINGS
20 FROM FEBRUARY 23, 2011 HEARING**

21 A hearing occurred in the above-captioned matter on February 23,
22 2011, in Richland. Timothy R. Thornton and Leland B. Kerr appeared on
23 Plaintiff BNSF Railway Company's (BNSF) behalf; Nicholas D. Kovarik, Paul
24 J. Petit, Robert A. Dunn, and David L. Meyer¹ appeared on Defendant Tri-
25 City & Olympia Railroad Company LLC's (TCRY) behalf; Timothy D.
26 Wackerbarth appeared on Plaintiff-Intervenor Union Pacific Railroad's
 (UP) behalf; Rob J. Crichton and Thomas A. Cowan, Jr. appeared on
 Plaintiff-Intervenor Port of Benton's ("Port") behalf. Before the Court
 were TCRY's Motion for Remand, ECF No. [200](#), Objection and Motion to
 Strike Portions of Declaration of Scott Keller, ECF No. [167](#), and Motion

1 Mr. Meyer appeared telephonically.

1 for Summary Judgment Against the Port of Benton, ECF No. 142; and the
 2 Port's Motion to Strike Supplemental Peterson Declaration, ECF No. 225,
 3 and Motion for Partial Summary Judgment, ECF No. 171. This Order
 4 memorializes and supplements the Court's oral rulings.²

5 **BACKGROUND³**

6 **I. TCRY's Motion to Strike Keller Declaration**

7 TCRY moves to strike Paragraphs 6 and 8 of Scott Keller's
 8 Declaration because it includes assertions that are not based on personal
 9 knowledge. TCRY objects to the underlined language in Paragraph 6:

10 At the time of the lease negotiations, TCRY's President,
 11 Randolph V. Peterson, was fully familiar with BNSF's use of the
 12 Richland Trackage. The Port made it clear to TCRY, and Mr.
Peterson fully understood, the Port's intent that BNSF would
continue to have access to the trackage after TCRY and the Port
entered into the Lease.

14 ² At the hearing, the Court indicated it would circulate a written
 15 order entering its oral rulings to the parties and provide an opportunity
 16 for comment. After extensive consideration, the Court finds this
 17 unnecessary and issues this Order without comment from the parties.

18 ³ When considering this motion and creating this factual section,
 19 the Court did not weigh the evidence or assess credibility; instead, the
 20 Court believed the undisputed facts and the opposing party's evidence and
 21 drew all justifiable inferences therefrom in its favor. See *Anderson v.*
 22 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the Court did
 23 not accept as true assertions made by the opposing party if they were
 24 flatly contradicted by the record. See *Scott v. Harris*, 550 U.S. 372,
 25 380 (2007). Disputed facts are supported by a citation to the record,
 26 while undisputed facts are not.

1 It also objects to the underlined language in Paragraph 8:

2 Mr. Peterson sought the removal of the foregoing provisions in
3 what was then § 7.3 of the draft Lease. Attached hereto as
4 Exhibit 2 is a true and correct copy of a marked-up copy of the
5 draft lease that the Port received from TCRY during
6 negotiations. My understanding is Mr. Peterson was responsible
7 for the handwritten provisions, including the striking of that
8 provision. The Port refused to accede to TCRY's request in
9 order to make clear that TCRY did not have exclusive right to
10 access the tracks.

11 TCRY takes issue with Mr. Keller's statements as to: 1) what the
12 Port "made clear" to Mr. Peterson, 2) what Mr. Peterson "fully
13 understood," and 3) whether Mr. Peterson "sought the removal" of certain
14 language in what was then Paragraph 7.3 in the draft Railroad Lease.

15 Mr. Keller was the Port's Executive Director at the time of the
16 negotiations and executed the Railroad Lease on the Port's behalf. He
17 was "fully familiar" with the negotiations. He had received the
18 correspondence that circulated among the parties in 2001, which clarified
19 BNSF's position regarding the parties' respective rights to the Richland
20 Tackage.

21 Those facts are sufficient for the Court to reasonably infer that
22 Mr. Keller had personal knowledge of the lease negotiations, including
23 what the Port "made clear" to TCRY. Fed. R. Civ. P. 56(e) (requiring an
24 affiant to be competent to testify as to the matters stated and base his
25 affidavit on his personal knowledge). And because Mr. Keller bases his
26 conclusion that Mr. Peterson "sought the removal" of specific language
in Paragraph 7.4 on the Port's receipt of a marked-up copy of the draft
Lease (which reflects that "Draft Changes" were "made by RV Peterson"),
Mr. Keller had sufficient personal knowledge to conclude that Mr.
Peterson sought to remove that language. Indeed, Mr. Peterson's
declaration substantiates that conclusion. ECF No. 187-2, at 1. Yet,

1 his statement regarding what Mr. Peterson "fully understood" is
 2 speculative as to Mr. Peterson's state of mind and cannot be used to
 3 infer TCRY's intent behind agreeing to Paragraph 7.4's language.
 4 Accordingly, the Court denies (as to what the Port "made clear" to Mr.
 5 Peterson and whether Mr. Peterson "sought the removal" of certain
 6 language in what was then Paragraph 7.3 in the draft Railroad Lease), and
 7 grants (as to what Mr. Peterson "fully understood") in part TCRY's motion
 8 to strike.

9 **II. The Port's Motion to Strike Supplemental Peterson Declaration**

10 The Port moves to strike the Supplemental Declaration of Randolph
 11 V. Peterson and the eight attached documents because they 1) are not
 12 based on "newly-discovered" evidence; and 2) go beyond what the Court
 13 contemplated and authorized in allowing TCRY to file a sur-reply.

14 Although generally loathe to consider late filings, the Court found
 15 good cause to allow TCRY to file a sur-reply based on the September 12,
 16 2000 letter. These filings include pre-2001 communications between the
 17 Port, TCRY, and UP, which aid the Court in understanding whether the
 18 parties envisioned the railroads to have direct access to the Richland
 19 Trackage or to interchange with TCRY.

20 The Court finds that Mr. Peterson's Supplemental Declaration and the
 21 accompanying sur-reply memo were not an improper effort to change TCRY's
 22 version of the facts. Although the letters were in TCRY's files for more
 23 than a decade, and although TCRY has been involved in this case for more
 24 than eighteen months, there is no evidence in the record to suggest that
 25 TCRY knew of those documents until after the deadline had passed for
 26 filing its opposition to the Port's summary judgment. *Cf. Goodstein v.*
Continental Cas. Co., 509 F.3d 1042, 1051 (9th Cir. 2007) (finding that

1 documents which could have been brought to the district court's attention
2 at the time of summary judgment were not "newly discovered evidence"
3 merely because they were presented with a motion for reconsideration).
4 Indeed, the letters attached as exhibits were purportedly found "as a
5 result of a search of all TCRY business records," a search for any
6 representations the Port may have made to TCRY before signing the
7 Railroad Lease. ECF No. 224, ¶ 6. The Port has not submitted evidence
8 proving that these documents were not "newly discovered." Given the
9 record, the Court has no reason to refuse to consider TCRY's sur-reply
10 and the accompanying Supplemental Declaration. Accordingly, the Port's
11 motion to strike is denied.

12 **III. Factual Background**

13 **A. 1947 Agreement**

14 On November 6, 1947, the United States, by and through the U.S.
15 Atomic Energy Commission ("Commission"), entered into an agreement ("1947
16 Agreement") with several railroads to establish service to the Hanford
17 site. BNSF and UP, the undisputed successors-in-interest to the 1947
18 Agreement, were granted "equal joint" operating rights over trackage
19 beginning near Kennewick and extending beyond Richland ("Richland
20 Trackage").

21 Article 18 of the 1947 Agreement provides:

22 Except as provided in this contract, all disputes concerning
23 questions of fact which may arise hereunder, and which are not
24 disposed of by mutual agreement, shall be decided by a
representative of the Commission duly authorized to supervise
and administer performance of the work hereunder, who shall
reduce his decision to writing and mail a copy thereof to the
Railroads. Within thirty (30) days for this mailing, the
Railroads may appeal in writing to the Commission, whose
written decision thereon shall be final and conclusive. Pending
decision of a dispute hereunder, the Railroads shall diligently
proceed with performance under this contract. To the extent

1 that disputes involve questions which are subject to
 2 determination by the Interstate Commerce Commission, National
 3 Railroad Adjustment Board, or other regulatory body having
 4 jurisdiction of such questions, this Article shall not apply;
 5 nor shall this Article apply to disputes between the Railroads
 6 which do not involve the Commission.

7 Article 8 also provides:

8 The Commission will have the general control, management and
 9 administration of said railway between points B and E, said
 10 interchange facilities and wye, and will at all times keep the
 11 same in good condition and repair

12 **B. 1961 Agreement and 1988 Indenture**

13 In 1961, the Commission entered into second agreement ("1961
 14 Agreement") with the Railroads. The 1961 Agreement did not modify,
 15 delete, or otherwise alter Article 18 of the 1947 Agreement. In 1998,
 16 the United States, by and through the U.S. Department of Energy ("DOE"),
 17 conveyed ownership of the Richland Trackage to the Port through an
 18 Indenture, thereby assigning the DOE and Commission's rights under the
 19 1947 and 1961 Agreements to the Port. As a result of these agreements,
 20 the Port has the right to terminate BNSF and UP's rights to use the
 21 Richland Trackage upon six months notice.

22 **C. Railroad Lease**

23 On October 1, 1998, the Port entered into a Maintenance and
 24 Operation Agreement with TCRY's predecessor, Livingston Rebuild Center,
 25 Inc. ("Livingston"), under which it agreed to pay Livingston \$325,000
 26 per year for the maintenance of the Richland Trackage. ECF No. 197, Ex.
 D. These contractual rights and obligations were subsequently assigned
 to TCRY. *Id.* Ex. G.

27 In May 2000, BNSF and TCRY contracted to interchange cars going into
 28 the Richland Trackage ("Interchange Agreement"). *Id.* Ex. H. They
 29 exchanged cars at the Richland Junction and TCRY served BNSF's customers

1 along the Richland Trackage. *Id.* TCRY maintained the trackage at its own
 2 expense; BNSF could use the tracks without charge. This contract
 3 specifically reserved BNSF's rights under the 1947 and 1961 Agreements.
 4 *Id.* TCRY began charging a per-car fee for its services.

5 In a September 12, 2000 letter to then-TCRY President John
 6 Haakenson, the Port's Assistant Executive Director Scott Keller
 7 acknowledged that the Port was paying TCRY to maintain the railroad under
 8 a contract that allowed TCRY to charge a fee for its railroad operations,
 9 the revenue from which would offset the cost of maintenance. ECF No.
 10 224, Ex. 1. Recognizing that UP was using the Richland Trackage without
 11 paying a fee, the Port directed TCRY "to give written notice to [UP]
 12 terminating its rights to use the Port of Benton track." *Id.* Beginning
 13 November 14, 2000, UP could no longer continue its unauthorized use of
 14 the Richland Trackage: it would need to establish an interchange
 15 agreement with TCRY. *Id.* Exs. 5 & 6.

16 From approximately April 2001 through November 2001, TCRY and BNSF
 17 continuously disagreed about BNSF's right to operate on the Richland
 18 Trackage. ECF No. 197, Ex. K. BNSF claimed the 1947 and 1961 Agreements
 19 allowed it to directly operate on the Richland Trackage without
 20 interchanging; TCRY maintained that BNSF could only operate on the
 21 Richland Trackage if it operated under the Interchange Agreement. *Id.*
 22 This correspondence was circulated to the Port.

23 In 2002, TCRY and the Port began negotiating a lease agreement
 24 ("Railroad Lease"), which would authorize TCRY to provide rail and track
 25 maintenance services on the Richland Trackage. Mr. Keller negotiated on
 26 the Port's behalf; TCRY CEO Randolph V. Peterson negotiated on behalf of
 TCRY. At this time, BNSF had been operating under the May 8, 2000

1 Interchange Agreement. On June 24, 2002, Mr. Peterson proposed the
 2 following language be removed from Paragraph 7.3:

3 ~~7.3 The Tenant shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port's prior written consent. The Tenant shall continue to provide rail access to areas currently served by the railroad unless the Port and Tenant mutually agree that such access is no longer practicable. All tariffs adopted by the Tenant for the use of the Railroad shall be approved by the Port.~~

7 ECF No. 197, Ex. N. Paragraph 7.3 became Paragraph 7.4 in the final
 8 draft, which reads as follows:

9 7.4 The Tenant shall not take any actions which will amend, modify, terminate or invalidate any existing contracts which the Port has with any other railroad carrier, without the Port's prior written consent. The Tenant shall continue to provide rail access to areas currently served by the railroad unless the Port and Tenant mutually agree that such access is no longer practicable.

13 ECF No. 174, Ex. M.

14 The parties disagree as to Paragraph 7.4's meaning. Mr. Keller
 15 maintains that, in retaining this language, the Port intended to make
 16 clear that TCRY could not interfere with the Port's pre-existing
 17 contractual relationships: UP and BNSF would continue to have "equal
 18 joint" operating rights under the 1947 and 1961 Agreements after TCRY and
 19 the Port entered into the Railroad Lease. ECF No. 162, ¶ 6 & 7.

20 But Mr. Peterson maintains that this language has nothing to do with
 21 exclusive access to the Richland Trackage: it relates to TCRY's right to
 22 "amend, modify, terminate or invalidate" contracts between the Port and
 23 other railroads. Although TCRY and BNSF were aware of each other's
 24 positions on this issue, TCRY claims it did not know the Port's position.

25 ECF No. 197, ¶ 34.

1 Railroad Lease Paragraph 23.8 entitles TCRY to the right of quiet
2 possession:

3 QUIET POSSESSION. The Port agrees that upon compliance with
4 the terms and conditions of this Lease, the Tenant shall at all
times have the right to the quiet use and enjoyment of the
Property for the term of the Lease and any extension.

5 The parties disagree as to whether this provision grants TCRY an
6 unqualified right to quiet enjoyment, which, by implication, would allow
7 TCRY to require UP and BNSF to interchange with TCRY. TCRY claims it
8 would not have executed the Railroad Lease if Paragraph 7.4 limited this
9 right to require others to interchange with TCRY, claiming such an
agreement makes no economic sense because UP and BNSF's direct operation
10 would increase its maintenance burden without compensation. *Id.* ¶ 37-39.
11 According to TCRY, if BNSF and UP were allowed to operate "direct" on the
12 Port's Railroad, TCRY would be deprived of all interchange revenue – but
13 its other sources of revenue and the Port payment would continue.

14 **D. Legal Action**

15 In 2009, BNSF informed TCRY it intended to exercise its rights to
16 directly operate on the Richland Trackage. TCRY objected: Mr. Peterson
17 threatened that, beginning July 20, 2009, "track maintenance" would
18 prevent BNSF from using the Richland Trackage at all. And on July 20 and
19 21, 2009, TCRY erected a barrier which physically prevented a BNSF
20 locomotive from reaching BNSF customers along the Richland Trackage. A
21 few days later, TCRY requested that the Port terminate the Richland
22 Trackage agreements with BNSF. The Port refused.

23 BNSF filed this suit on July 20, 2009. ECF No. 1. UP moved to
24 intervene on August 4, 2009, ECF No. 26, and the Court granted UP's
25 Motion. ECF No. 46. On August 12, 2009, the Court granted BNSF's motion

1 for a preliminary injunction, prohibiting TCRY from blocking BNSF's
2 access to the Richland Trackage and requiring TCRY to charge its
3 customary fee. ECF No. 46 & 93. TCRY filed an interlocutory appeal on
4 September 9, 2009, which was voluntarily dismissed.

5 **E. The Port's Intervention**

6 The Court granted the Port's request to intervene on March 8, 2010.
7 ECF No. 121. On June 2, 2010, TCRY filed a separate but related action
8 in Benton County Superior Court against the Port, asserting claims for
9 inverse condemnation, breach of contract, breach of implied covenant of
10 good faith and fair dealing, promissory estoppel, and quantum meruit. ECF
11 No. 209, Ex. 1. By order dated August 20, 2010, the Superior Court
12 stayed the state court action, pending resolution of the federal claims
13 in this Court. *Id.* Ex. 2.

14 On September 29, 2010, the Port amended its complaint, asserting
15 that TCRY breached Railroad Lease Paragraph 7.4, which prohibits TCRY
16 from "amend[ing], modify[ing], terminat[ing], or invalidat[ing]" other
17 railroads' existing contractual relationships with the Port, when it
18 temporarily blocked BNSF Railroad Company (BNSF)'s access to the Richland
19 Trackage in July 2009. ECF No. 136. TCRY asserted several counterclaims
20 against the Port: inverse condemnation, breach of contract, breach of
21 implied covenant of good faith and fair dealing, promissory estoppel,
22 quantum meruit, and tortious interference with contract. ECF No. 165,
23 at ¶¶ 18-24.

24 **F. Recent Developments**

25 TCRY filed the instant motion for summary judgment on October 20,
26 2010, seeking dismissal of the Port's Amended Complaint. And on November
24, 2010, the Port moved for summary dismissal of TCRY's counterclaims,

each of which relies on TCRY's theory that the right to quiet enjoyment under the Railroad Lease allows it to gain revenue by requiring railroads to interchange with it. ECF No. 171. On December 1, 2010, TCRY sought to continue hearing on the instant motions for summary judgment in order to obtain discovery regarding the intent of the contracting parties when drafting Railroad Lease Paragraph 7.4. ECF No. 175. The Court denied the motion.

TCRY then moved on December 17, 2010, to remand the inverse condemnation claims to state court for determination where they were originally asserted. ECF No. 200.

On January 3, 2011, TCRY moved to reconsider the Court's continuance denial, or in the alternative, to file a sur-reply. ECF No. 210. The basis for that motion was a September 12, 2000 letter from Mr. Keller to John Haakenson of TCRY, which TCRY counsel represented had been located on December 31, 2010, by Mr. Peterson, though this case had then been pending for some seventeen months. ECF No. 224, ¶ 4. The Court granted TCRY leave to file a sur-reply, ruling that "[g]iven newly discovered evidence which may bear on interpretation of the Lease, the Court finds good cause to allow TCRY to file a sur-reply to the Port of Benton's ("Port") Motion for Summary Judgment." ECF No. 218.

DISCUSSION

I. Motions for Summary Judgment

TCRY moves for summary judgment dismissal of the Port's Amended Complaint, arguing that both claims fail as a matter of law: neither the Railroad Lease nor any of the Richland Tackage agreements give the Port the authority to resolve disputes between railroads and TCRY did not breach the Railroad Lease. The Port also moves for summary judgment,

1 asking the Court to dismiss TCRY's counterclaims, which all center on
 2 TCRY's right to quiet enjoyment of the leased property.

3 **A. Summary Judgment Standard**

4 Summary judgment is appropriate if the record shows "that there is
 5 no genuine issue as to any material fact and that the moving party is
 6 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The
 7 party opposing summary judgment must point to specific facts establishing
 8 a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*,
 9 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*
 10 *Corp.*, 475 U.S. 574, 586-87 (1986). If the nonmoving party fails to make
 11 such a showing for any of the elements essential to its case for which
 12 it bears the burden of proof, the trial court should grant the summary
 13 judgment motion. *Celotex Corp.*, 477 U.S. at 322.

14 **B. Applicable Law**

15 When interpreting a contract, the Court's role "is to ascertain the
 16 parties' intentions and give effect to their intentions." *Taylor-Edwards*
Warehouse & Transfer Co. of Spokane, Inc. v. Burlington N., Inc., 715
 18 F.2d 1330, 1334 (9th Cir. 1983) (citing *Jones v. Hollingsworth*, 88 Wn.2d
 19 322, 326 (1977)). Under Washington law, "extrinsic evidence is
 20 admissible as to the entire circumstances under which the contract was
 21 made, as an aid in ascertaining the parties' intent." *Berg v. Hudesman*,
 22 115 Wn.2d 657, 667 (1990). The Court considers:

23 (1) the subject matter and objective of the contract, (2) the
 24 circumstances surrounding the making of the contract, (3) the
 25 subsequent conduct of the parties to the contract, (4) the
 26 reasonableness of the parties' respective interpretations, (5)
 statements made by the parties in preliminary negotiations, (6)
 usages of trade, and (7) the course of dealing between the
 parties.

1 *Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 129
 2 Wn. App. 303, 311 (2005) (citing *Berg*, 115 Wn.2d at 666-68). "Such
 3 evidence is admissible regardless of whether the contract language is
 4 deemed ambiguous." *Id.* Yet, neither a unilateral or subjective opinion
 5 as to the meaning of a contract word or term nor evidence that would
 6 contradict or vary the written word is admissible extrinsic evidence.
 7 *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695 (1999).

8 If there are two or more reasonable meanings to contract language,
 9 a question of fact is presented that precludes summary
 10 judgment. *Anderson Hay & Grain Co., Inc v. United Dominion Indus., Inc.*,
 11 119 Wn. App. 249, 255 (2003). Only when interpretation does not depend
 12 on extrinsic evidence, or when extrinsic evidence leads to only one
 13 reasonable interpretation, can intent be decided as a matter of law on
 14 summary judgment. *Id.*

15 **C. TCRY's Motion for Summary Judgment Against the Port of Benton**

16 TCRY moves for summary judgment, asking the Court to dismiss both
 17 claims in the Port's Amended Complaint because neither the Railroad Lease
 18 nor any of the Trackage Agreements give the Port the authority to resolve
 19 disputes and TCRY did not as a matter of law breach the Railroad Lease.
 20 Both BNSF and the Port oppose the motion, arguing that material issues
 21 of fact preclude summary judgment.

22 1. The Port's Authority to Resolve Disputes

23 TCRY seeks summary dismissal of the Port's first cause of action,
 24 arguing that the Port does not have the sole authority to decide issues
 25 under the Trackage Agreements. In response, the Port clarifies its
 26 claim: it seeks the Court's assistance in establishing a protocol for
 resolving disputes under the operating agreements. ECF No. 136-1, at 11.

1 a) *1947 Agreement*

2 Article 18 of the 1947 Agreement provides:

3 Except as provided in this contract, all disputes concerning
4 questions of fact which may arise hereunder, and which are not
5 disposed of by mutual agreement, shall be decided by a
6 representative of the Commission duly authorized to supervise
7 and administer performance of the work hereunder, who shall
8 reduce his decision to writing and mail a copy thereof to the
9 Railroads. Within thirty (30) days for this mailing, the
10 Railroads may appeal in writing to the Commission, whose
11 written decision thereon shall be final and conclusive. Pending
12 decision of a dispute hereunder, the Railroads shall diligently
13 proceed with performance under this contract. To the extent
14 that disputes involve questions which are subject to
15 determination by the Interstate Commerce Commission, National
16 Railroad Adjustment Board, or other regulatory body having
17 jurisdiction of such questions, this Article shall not apply;
18 nor shall this Article apply to disputes between the Railroads
19 which do not involve the Commission.20 Article 18 of the 1947 Agreement was never modified by any
21 subsequent agreements between the Railroads. Its plain language
22 unambiguously provides that the Port, as successor-in-interest to the
23 Commission, has the authority to decide "disputes concerning questions
24 of fact." The parties agree that no factual disputes have been presented
25 to the Port and thus, the 1947 Agreement does not confer dispute-
26 resolution authority upon the Port in this instance.19 b) *Railroad Lease*

20 Paragraph 7.2 of the Railroad Lease states:

21 7.2 In the event the Department of Energy or any
22 other user of the railroad files a complaint with
23 the Port concerning the Tenant's rates, tariffs or
24 operations, the Port will notify the Tenant of the
25 complaint and will attempt to resolve the complaint
26 through negotiations with the tenant and the
 complainant.27 7.2.1 If the complaint involves matters
28 which are within the purview of the National Surface
29 Transportation Board (NSTB), the Port will, to the
30 extent applicable, utilize the rules of the NSTB to
31 resolve the dispute.

1 7.2.2 If the Port is unable to resolve the
 2 complaint which is within the jurisdiction of the
 3 NSTB and which the NSTB will accept for resolution,
 4 the complaint shall be referred to the NSTB, if
 5 permitted by the terms and conditions of the
 6 Indenture and the Quit Claim Deed.

7 7.2.3 Complaints which can not be referred
 8 to the NSTB, shall be resolved pursuant to the terms
 9 and conditions of this Lease.

10 The Railroad Lease unambiguously grants the Port authority to
 11 resolve "complaints" "filed" with the Port "concerning the Tenant's
 12 rates, tariffs, or operations." Because the parties agree that no such
 13 complaint was filed in connection with this lawsuit, the Port's authority
 14 under the Lease to decide BNSF's rights to operate on the Richland
 15 Trackage has not been invoked.

16 c) *General Control, Management, and Administration*

17 Article 8 of the 1947 Agreement provides:

18 The Commission will have the general control, management and
 19 administration of said railway between points B and E, said
 20 interchange facilities and wye, and will at all times keep the
 21 same in good condition and repair

22 The Port's First Amended Complaint seeks a declaratory judgment
 23 "that the Port retains the general control, management and administration
 24 of the Richland Trackage, interchange facilities, and wye." ECF No. 136-
 25 1, at 13.

26 TCRY argues that there is no immediate and real controversy which
 27 would warrant such a declaratory judgment. See 28 U.S.C. § 2201(a) ("In
 28 a case of actual controversy within its jurisdiction . . . any court of
 29 the United States . . . may declare the rights and other legal relations
 30 of any interested party seeking such declaration."); see also *Am. States
 31 Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994) ("[A] district court
 32 must first inquire whether there is an actual case or controversy within

1 its jurisdiction."). In determining whether such case or controversy
 2 exists, courts ask whether "there is a substantial controversy, between
 3 parties having adverse legal interests, of sufficient immediacy and
 4 reality to warrant the issuance of a declaratory judgment." *Maryland*
 5 *Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

6 This dispute is over the alleged breach of the 1947 and 1961
 7 Agreements and the Railroad Lease. TCRY does not dispute that the Port
 8 received certain rights by assignment. Yet, the Port also seeks a
 9 declaratory judgment setting "procedures for resolving disputes regarding
 10 operating rights that exist under the Richland Trackage Contracts and the
 11 Lease and to prevent further actions which would violate the Court's
 12 determination." Nowhere does it seek sole authority over dispute
 13 resolution on the Richland Trackage. On this record, the Court rules
 14 there is no basis to dismiss and accordingly, denies TCRY's motion to do
 15 so.

16 2. Breach of the Railroad Lease

17 It is First Amended Complaint, the Port contends that TCRY breached
 18 Paragraph 7.4 by "interfering with BNSF's existing contractual rights
 19 under the Richland Trackage Contracts," when it blocked BNSF's access to
 20 the Richland Trackage in July 2009. ECF No. 136-1. It seeks a
 21 declaratory judgment and permanent injunction preventing TCRY from
 22 further breaching Paragraph 7.4 by interfering with other railroads'
 23 operating rights.

24 TCRY seeks dismissal on summary judgment, arguing that it did not
 25 breach Paragraph 7.4 because that paragraph does not explicitly prohibit
 26 TCRY from "interfering with" BNSF's contract rights with the Port. In
 response, the Port contends that Paragraph 7.4 was intended to make clear

1 that TCRY's operations on the Richland Trackage were subject to the
 2 concurrent rights of other railroads operating on it and that TCRY was
 3 in breach by interfering with those rights.

4 Because only TCRY has moved for summary judgment on this issue, the
 5 Court views the entire circumstances under which the Railroad Lease was
 6 made in a light most favorable to the Port. The Court concludes that the
 7 Port has presented a reasonable interpretation of Railroad Lease
 8 Paragraph 7.4 that at the least precludes summary judgment. The 1947 and
 9 1961 Agreements granted BNSF and UP the right to operate on the Richland
 10 Trackage without further payments. The Port could terminate BNSF and
 11 UP's right to operate upon six months notice.⁴ These rights were not
 12 modified by any subsequent agreements.⁵ When TCRY entered into the
 13 Railroad Lease, it took the Port's rights and it took them subject to the
 14

15 ⁴ The Court has already preliminarily found that "TCRY's lease with
 16 the Port explicitly left intact the Port's existing contracts with other
 17 railroad carriers," and that BNSF had a right to operate on the tracks.
 18 ECF No. 93, at 8-9.

19 ⁵ Other agreements indicate that the parties understood that BNSF
 20 and TCRY retained the right to direct access to the Trackage. The May
 21 2000 Interchange Agreement between BNSF and TCRY, which was in effect
 22 during negotiations for the Railroad Lease, specifically reserved BNSF's
 23 rights under the 1947 and 1961 Agreements. See ECF No. 197, Ex. H ("[The
 24 interchange designation] does not limit BNSF's usage of trackage as
 25 provided under separate agreements dated November 6, 1947, and January
 26 24, 1961, as supplemented and modified.").

1 Indenture. Yet, Railroad Lease Paragraph 7.4 prohibited TCRY from
2 unilaterally "amend[ing], modify[ing], terminat[ing] or invalidat[ing]
3 any existing contracts which the Port has with any other railroad
4 carrier, without the Port's prior written consent." ECF No. 174, Ex. M,
5 ¶ 7.4. And TCRY was required to "continue to provide rail access to
6 areas currently served by the railroad unless the Port and Tenant
7 mutually agree that such access is no longer practicable." *Id.*

8 Thus, from the face of the Railroad Lease Paragraph 7.4, BNSF and
9 UP have a right to operate directly on the Richland Trackage and the Port
10 retained the right to terminate those rights. TCRY was aware of this and
11 unsuccessfully sought to have Paragraph 7.4 removed from the Railroad
12 Lease before executing it. Having executed the Railroad Lease with
13 Paragraph 7.4, TCRY, a sophisticated business, accepted the rights of
14 BNSF and UP to operate on the tracks.

15 Mr. Keller, who executed the Railroad Lease on the Port's behalf,
16 claims that Paragraph 7.4 was included to make clear that TCRY could not
17 interfere with the Port's pre-existing contractual relationships with UP
18 and BNSF. That is, the Port intended to make clear that UP and BNSF
19 would continue to have "equal joint" operating rights secured by the 1947
20 and 1961 Agreements after TCRY and the Port entered into the Railroad
21 Lease. TCRY's Mr. Peterson maintains that this language has nothing to
22 do with the exclusive access to the tracks; rather, it relates to TCRY's
23 right to directly "amend, modify, terminate or invalidate" contracts
24 between the Port and the Railroads, which it did not do.

25 The circumstances surrounding the making of the Railroad Lease
26 indicate that the Port's interpretation is the only reasonable one. TCRY
and BNSF had been operating under an Interchange Agreement since 2000;

1 BNSF was not directly operating on the Richland Trackage during
2 negotiations. Also during negotiations, TCRY was engaged in a dispute
3 with BNSF over BNSF's use of the Richland Trackage. Two years earlier,
4 TCRY had been engaged in a similar dispute with UP. Mr. Peterson sought
5 the removal of language in Paragraph 7.4; specifically, language that
6 TCRY "shall not take any actions which will amend, modify, terminate or
7 invalidate any existing contracts which the Port has with any other
8 railroad carrier, without the Port's prior written consent." Despite
9 BNSF and TCRY's continuing disagreement on this point, Mr. Peterson
10 voluntarily signed the Railroad Lease on behalf of TCRY and agreed that
11 it would not "amend, modify, terminate or invalidate" any agreements the
12 Port had with the Railroads.

13 When TCRY blocked BNSF's access to the Richland Trackage, it took
14 action which in effect amended, modified, terminated, or invalidated the
15 Port's existing contractual relationship with BNSF: it blocked BNSF from
16 exercising its right to operate on the tracks, a right secured by the
17 1947 and 1961 Agreements and subject to termination only by the Port. To
18 adopt TCRY's interpretation of Paragraph 7.4 would render Paragraph 7.4
19 ineffective and meaningless. *Cambridge Townhomes, LLC v. Pac. Star*
20 *Roofing, Inc.*, 166 Wn.2d 475, 487 (2009) ("Courts should not adopt a
21 contract interpretation that renders a term ineffective or
22 meaningless."). TCRY's motion for summary judgment regarding breach of
23 contract is denied.

24 **D. The Port's Motion for Partial Summary Judgment Against TCRY**

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1 The Port seeks summary dismissal of TCRY's six counterclaims⁶
2 against the Port, claiming that that TCRY's quiet use and enjoyment right
3 was taken subject to the concurrent rights of other railroads operating
4 on it, namely BNSF and UP. TCRY disagrees, contending that when BNSF
5 decided to begin running direct on the Richland Trackage, the Port was
6 obligated under the Railroad Lease to protect TCRY's right to quiet use
7 and enjoyment by either 1) terminating the 1947 and 1961 Agreements or
8 2) compensating TCRY for the damage to its property right.

9 Central to each of TCRY's counterclaims is the property right of
10 quiet enjoyment conveyed to TCRY by the Port in Railroad Lease Paragraph
11 23.8:

12 QUIET POSSESSION. The Port agrees that upon compliance with
13 the terms and conditions of this Lease, the Tenant shall at all
14 times have the right to the quiet use and enjoyment of the
15 Property for the term of the Lease and any extension.

16 The parties agree that Paragraph 23.8 Railroad Lease conveyed to
17 TCRY the right to quiet use and enjoyment of the Richland Trackage for
18 the Railroad Lease's duration—it contains no express limitation on TCRY's
19 property right of quiet enjoyment. Yet, the parties disagree as to
20 whether Paragraph 7.4 impliedly limits this right by requiring TCRY to
21 allow railroads to directly operate on the Richland Trackage without
22 interchanging with it.

23 ⁶ TCRY's six counterclaims are for inverse condemnation, breach of
24 contract, breach of implied covenant of good faith and fair dealing,
25 promissory estoppel, quantum meruit, and tortious interference. ECF No.
26 165.

1 Viewing the entire circumstances under which the Railroad Lease was
2 made in a light most favorable to TCRY, TCRY fails to present a
3 reasonable construction of the Railroad Lease that precludes summary
4 judgment. As stated above, BNSF and UP have a right to operate directly
5 on the Richland Trackage. Only the Port had the right to terminate BNSF
6 and UP's right to use the Richland Trackage, a right which it retained
7 and did not grant to TCRY under Railroad Lease Paragraph 7.4. Indeed,
8 it could not do so: the Port accepted the United States' obligations
9 under the 1947 and 1961 agreements to provide continued use without
10 charge to BNSF and UP under the Indenture.

11 Mr. Peterson claims he would not have executed the Railroad Lease
12 for TCRY if Paragraph 7.4 limited this right to quiet enjoyment, which
13 he believes included the right to require others to interchange with
14 TCRY: such agreement makes no economic sense because UP and BNSF's direct
15 operation would increase its maintenance burden without
16 compensation. ECF No. 197, ¶ 37-39. But the record shows he tried to
17 negotiate removal of Paragraph 7.4 and when the Port refused to remove
18 it, Mr. Peterson, a shrewd, sophisticated executive of TCRY, with
19 undisputed authority, executed the Railroad Lease.

20 The record before the Court shows at the time of negotiations, TCRY
21 and BNSF were operating under an Interchange Agreement at the time of
22 negotiations: BNSF was not directly operating on the Trackage from 2000
23 to 2009, though it had the right to do so. Also during lease
24 negotiations, TCRY was engaged in a dispute with BNSF over TCRY's charges
25 to BNSF for its use of the Richland Trackage. Two years earlier, TCRY
26 had been engaged in a similar dispute with UP regarding UP's use of the

1 Richland Trackage, at which time the Port recognized that TCRY would make
2 money by operating the railroad and directed TCRY to notify UP it was
3 terminating its rights to use the Trackage. There is no evidence that
4 the Port made any representations - either within the Railroad Lease or
5 during negotiations - that it would terminate its existing agreements
6 with the Railroads or reimburse TCRY for maintenance costs. Nor could
7 that be a rational interpretation of the Railroad Lease or any paragraph
8 therein, particularly Paragraph 23.8. The fact that the Port agreed to
9 terminate UP's right to use the Richland Trackage two years earlier is
10 insufficient for the Court to create an issue of fact as to whether the
11 parties intended that the Port would either terminate BNSF's rights to
12 use or compensate TCRY for the damages if BNSF began exercising its right
13 to directly use the Richland Trackage: it is simply not informative on
14 that point.

15 The Port's contention that TCRY's right to quiet enjoyment was taken
16 subject to the limitations imposed by the preexisting rights of BNSF and
17 UP pursuant to the 1947 and 1961 Agreements is, on the other hand,
18 reasonable. When interpreting a contract, a court should "harmonize
19 clauses that seem to conflict. [The court's] goal is to interpret the
20 agreement in a manner that gives effect to all the contract's
21 provisions." *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849
22 (2007). But if Paragraph 23.8 granted TCRY an unlimited, unqualified
23 right of quiet enjoyment that allowed it to exclude others from directly
24 using the tracks, then Paragraph 7.4 would be rendered ineffective and
25 meaningless because it would not allow UP and BNSF to run directly on the
26 Richland Trackage without paying a fee. See *Cambridge Townhomes, LLC*,

1 166 Wn.2d at 487. Read together, rather than in isolation, Paragraph
2 23.8 and Paragraph 7.4 can only be reasonably read to grant TCRY a right
3 to quiet enjoyment of the Richland Trackage, subject to the limitations
4 imposed by the preexisting rights of BNSF and UP pursuant to the 1947 and
5 1961 Agreements.

6 Given the circumstances existing at the time the Lease was executed,
7 the only reasonable interpretation of the Railroad Lease is that
8 Paragraph 23.8 did not grant TCRY an unlimited, unqualified right to
9 quiet enjoyment; rather, that right was taken subject to UP and BNSF's
10 continued use of the Richland Trackage, as secured by the 1947 and 1961
11 Agreements, promised by the Port under the Indenture, and agreed to by
12 TCRY under Paragraph 7.4 of the Railroad Lease. Accordingly, the Port's
13 motion for summary judgment is granted; TCRY's counterclaims for inverse
14 condemnation, breach of contract, breach of implied covenant of good
15 faith and fair dealing, promissory estoppel, quantum meruit, and tortious
16 interference are dismissed.

17 **E. TCRY's Motion to Remand**

18 TCRY moves to remand its inverse condemnation claim to Benton County
19 Superior Court for adjudication where it was originally asserted because
20 it involves unique questions of state constitutional law. Both the Port
21 and BNSF oppose the motion. TCRY filed an inverse condemnation action
22 against the Port in Benton County Superior Court, which was subsequently
23 stayed pending resolution of factual issues surrounding the Lease in this
24 Court. After the Port filed its Amended Complaint in this Court, TCRY

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1 asserted its inverse condemnation counterclaim,⁷ so as not to abandon
 2 what may be a compulsory counterclaim.

3 Under Washington law, only a judge of the Superior Court "preside
 4 at the trial to determine the compensation and damage to be awarded," and
 5 such trial shall occur in the courthouse of the county where the property
 6 interest was allegedly taken. RCW 8.04.110 & RCW 8.04.080. Yet, federal
 7 courts exercise supplemental jurisdiction over inverse condemnation
 8 claims. See, e.g., *White v. Cnty. of Newberry, S.C.*, 985 F.2d 168, 172
 9 (4th Cir. 1993) (supplemental jurisdiction over a state inverse
 10 condemnation claim); *Patel v. Penman*, 103 F.3d 868, 877-78, overruled on
 11 other grounds by, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546
 12 U.S. 394 (2006) (9th Cir. 1996) (supplemental jurisdiction over inverse-
 13 condemnation claim declined only after against all but one federal claims
 14 were granted).

15 As this Court has already acknowledged, this is a contract dispute
 16 over which federal courts have jurisdiction. See ECF No. 93, at 4
 17 (citing *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 220 (4th
 18 Cir. 2009)). Under 28 U.S.C. § 1337(c), a district court has
 19 supplemental jurisdiction over claims "that are so related to claims in
 20 the action within [the district court's] original jurisdiction that they
 21 form part of the same case or controversy." It may decline to exercise
 22 supplemental jurisdiction only if: 1) novel or complex state-law issues
 23 are raised; 2) the state claim "substantially predominates" over the

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 25 ⁷ In asserting this counterclaim, TCRY questioned whether this Court
 26 had jurisdiction over it.

1 federal jurisdiction claims; 3) the federal jurisdiction claims have been
2 dismissed; or 4) in "exceptional circumstances" when there are "other
3 compelling reasons" to decline. 28 U.S.C. § 1367(c).

4 At this juncture, TCRY's inverse-condemnation counterclaim neither
5 presents a novel or complex state-law issue nor predominates over the
6 issues still to be resolved by this Court. Breach-of-contract claims
7 remain and predominate over TCRY's inverse-condemnation claim. TCRY's
8 counterclaim for inverse condemnation is based upon an illegal taking or
9 damaging of TCRY's property right of quiet enjoyment under RCW 53.08.110,
10 which was secured by Paragraph 23.8 of the Railroad Lease. ECF No. 165.
11 The Court has determined that Paragraph 23.8 did not grant TCRY an
12 unlimited, unqualified right to quiet enjoyment, a premise which
13 underlies all TCRY's counterclaims, including its claim for inverse
14 condemnation. Thus, no novel or complex state law issues remain; and a
15 Superior Court Judge need not preside at the condemnation trial to
16 determine the compensation and damage to be awarded. Accordingly, TCRY's
17 motion to remand is denied as moot.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. TCRY's Objection and Motion to Strike Portions of Declaration
20 of Scott Keller, **ECF No. 167**, is **GRANTED** (as to what Mr. Peterson "fully
21 understood") and **DENIED** (as to what the Port "made clear" to Mr. Peterson
22 and whether Mr. Peterson "sought the removal" of certain language in what
23 was then Paragraph 7.3 in the draft Railroad Lease) **IN PART**.

24 2. The Port's Motion to Strike Supplemental Peterson Declaration,
25 **ECF No. 225**, is **DENIED**.

3. TCRY's Motion for Summary Judgment Against the Port of Benton,
ECF No. 142, is DENIED.

4. The Port's Motion for Partial Summary Judgment, ECF No. [171](#), is GRANTED.

5. TCRY's Motion for Remand, ECF No. 200, is DENIED as moot.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to counsel.

DATED this 1st day of July 2011.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge

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